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IN THE

Supreme Court of the United States

October Term, 19[illegible]

No. 915

EMBROKE HUCKINS AND AVA S. HUCKINS, his wife, AND ELIZABETH A. PAYNE, a widow,

Petitioners,

vs.

DUVAL COUNTY, a political subdivision of the State of Florida, and LEROY COLLINS, Governor, J. EDWIN LARSON, State Treasurer, RAY E. GREEN, Comptroller, RICHARD W. ERVIN, Attorney General, and NATHAN MAYO, Commissioner of Agriculture, as and constituting the Trustees of the Internal Improvement Fund of the State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1960

No._____

PEMBROKE HUCKINS AND AVA S. HUCKINS, HIS WIFE, AND ELIZABETH A. PAYNE, A WIDOW,
Petitioners,

v.

DUVAL COUNTY, a political subdivision of the State of Florida; and LEROY COLLINS, Governor, J. EDWIN LARSON, State Treasurer, RAY E. GREEN, Comptroller, RICHARD W. ERVIN, Attorney General, and NATHAN MAYO, Commissioner of Agriculture, as and constituting the Trustees of the Internal Improvement Fund of the State of Florida,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a judgment of the United States District Court for the Southern District of Florida, dismissing, for lack of Federal jurisdiction, a suit brought by Petitioners to quiet their title to certain land in Duval County, Florida.

Opinions Below

The District Court's "Order Dismissing Complaint" (R. 22) and its "Order Dismissing Cause" (R. 23) are unreported.

The opinion of the Court of Appeals (App., pp. 1a-6a) is reported at 286 F. 2nd 46.

Jurisdiction

The judgment of the Court of Appeals was entered on December 28, 1960 (App. p. 7a). A timely petition for rehearing was denied on January 24, 1961 (App. p. 8a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

The questions presented for review are:

1. Does a suit to quiet title to a part of a Spanish land grant which has been confirmed by Treaty and certain Acts of Congress arise under such Treaty and Acts of Congress so as to entitle the plaintiffs to invoke the jurisdiction of the District Court under 28 U.S.C. Section 1331(a) when the complaint shows that (a) the sole issue involved is a present controversy between plaintiffs and defendants with respect to the effect of such confirmation upon the boundaries described in the grant, and (b) that plaintiffs' title will be supported if such confirmation is held to have one effect upon these boundaries, but defeated if held to have another effect with respect thereto?

2. In a suit to quiet title which presents a Federal question, is Federal jurisdiction ousted because several non-Federal issues may be involved?

3. In a suit to quiet title to Florida lands, may allegations in the complaint showing the nature of the defend-

ants' claims be relied upon to support a contention that a Federal question is presented?

Statute Involved

The only statute involved is 28 U.S.C. Section 1331(a), which reads as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Statement of the Case

On November 10, 1958, Petitioners filed in the United States District Court for the Southern District of Florida, a Complaint against Respondents seeking (1) to quiet their title to certain lands in Duval County, Florida, and (2) to cancel certain deeds as clouds upon Petitioners' title thereto (R. 1-19). The substance of the allegations of the Complaint may be briefly summarized as follows:

1. The land involved, which for convenience is designated as Parcel A, is a part of a tract of land in Duval County, Florida, which was granted by the King of Spain to Andrew Atkinson by Royal Title dated April 5, 1816 (R. 2-3). This grant, which is referred to as the Andrew Atkinson Grant, was confirmed by the Treaty of 1819 with Spain, by the United States Land Commissioners appointed to confirm land grants in Florida, and by certain Acts of Congress (R. 4). The northern boundary of the grant as confirmed was described as the St. Johns River (R. 3).

2. Parcel A, being a part of the Andrew Atkinson Grant, was formerly attached to, and a part of, the mainland on the south shore of the St. Johns River,

but during the period from 1949 to 1951 the Corps of Engineers dredged a new channel of the river across, upon and through the Andrew Atkinson Grant in such a manner as to separate Parcel A from the remainder of the grant and convert Parcel A into an island (R. 3-4).

3. Petitioners claim to own the fee simple title to Parcel A (R. 2), and have deraigned their title thereto, by mesne conveyances, from the grant by the King of Spain and the confirmation thereof by the Treaty, the Land Commissioners and Congress (R. 4-19).

4. The Bureau of Land Management of the United States Department of the Interior caused an Extension Survey to be made in 1949 of the township wherein Parcel A is situated, and said survey purported to locate the north boundary of the Andrew Atkinson Grant elsewhere than at the St. Johns River, thereby purporting to determine that Parcel A was not a part of the grant, but was still a part of the public domain. (R. 13-14).

5. Those Respondents herein who constitute the Trustees of the Internal Improvement Fund of the State of Florida claim some right, title and interest in Parcel A (R. 14) by virtue of a patent in 1951 from the Bureau of Land Management purporting to convey all of Parcel A to the State under the Swamp and Overflow Lands Act (43 U.S.C., Sections 982, 983 and 984). Under Sections 253.01 and 253.02, Florida Statutes, the Trustees of the Internal Improvement Fund became invested with whatever title the State acquired under the patent (R. 13-14).

6. The Respondent, Duval County (being the only other defendant) claims some right, title and interest to a portion of Parcel A by virtue of a deed

from the Trustees of the Internal Improvement Fund purporting to convey a portion thereof to the County in 1959 (R. 14, 15).

7. Petitioners contend that the claims of both Respondents are null and void because: (a) the Treaty and Acts of Congress confirming the Andrew Atkinson Grant as running to the St. Johns River on the north were conclusive against the United States with respect to the north boundary, which is a well defined natural landmark, and, therefore, Parcel A was not a part of the public domain when the Extension Survey was made, (b) the Bureau of Land Management had no jurisdiction or authority to determine that Parcel A was a part of the public domain and issue the above described patent, (c) such determination and patent are null and void, and (d) the Respondents acquired no right, title or interest in Parcel A by reason of the patent (R. 14-16).

8. Respondents have asserted that, although Congress confirmed the Andrew Atkinson Grant as running to the St. Johns River on the north, the Bureau of Land Management, nevertheless, had jurisdiction and authority subsequently to change the location of this north boundary as it did in the Extension Survey. Notwithstanding such assertions by Respondents, said Treaty and Acts of Congress confirming the grant as running to the St. Johns River on the north, were conclusive on the United States in this respect and the Bureau of Land Management subsequently had no jurisdiction or authority to change the location of the northern boundary of the grant. (R. 16-17).

9. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00 (R. 2), and the District Court has jurisdiction under Title 28, U.S.C. Section 1331(a) (R. 2, R. 16-17), because a

correct decision of the case depends upon a proper construction of the Treaty and Acts of Congress confirming the Andrew Atkinson Grant as running to the St. Johns River on the north, in that Petitioners' title to Parcel A will be sustained if such confirmation is construed in accordance with Petitioners' contention, as stated in paragraph 7 above, but their title will be defeated if construed in accordance with Respondents' contentions as set forth in paragraph 8 above (R. 16-18).

The Respondents filed Motions to Dismiss on the ground that the Court lacked jurisdiction because the alleged claim did not arise under the Constitution, laws or treaties of the United States, and on the further ground that the Complaint failed to state a cause of action (R. 19-21).

After hearing, the District Court, on February 8, 1960, entered its "Order Dismissing Complaint" on the grounds that the Petitioners' claim did not arise under the Constitution, laws or treaties of the United States, that the Court was not called upon to construe or interpret either the Treaty or the Acts of Congress, and that jurisdiction was invoked simply to fix the boundary of property to which Petitioners claim title. Petitioners were given leave to amend their Complaint (R. 22-23).

Thereafter, Petitioners having failed to amend, the District Court on March 8, 1960, entered its "Order Dismissing Cause" for lack of jurisdiction (R. 23-24). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, holding that it saw no necessity for a construction of the Treaty or Acts of Congress in order to make a disposition of the case (App. p. 5a).

Reasons for Granting the Writ

I

IN REACHING ITS DECISION THAT NO FEDERAL QUESTION WAS INVOLVED, THE COURT BELOW DISREGARDED THE ALLEGATIONS OF PETITIONERS' COMPLAINT, AND DECIDED THE CASE IN A WAY IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

The decision below was decided in a way in conflict with applicable decisions of this court, which have uniformly held that whether a case is one involving a Federal question is to be determined solely by the allegations of the plaintiff's complaint. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 57 L.Ed. 716, 33 S.Ct. 410 (1913); *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 67 L.Ed. 977, 43 S.Ct. 540 (1923); *Gully v. First National Bank*, 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1936); *Hillsborough Township v. Cromwell*, 326 U.S. 620, 90 L.Ed. 358, 66 S.Ct. 445 (1946); *Bell v. Hood*, 327 U.S. 678, 90 L.Ed. 939, 66 S.Ct. 773 (1946). Numerous other cases to the same effect are collected in the Annotation appearing in 12 A.L.R.2d 5, at page 41, footnote 19.

The Court of Appeals properly recognized that to sustain Federal jurisdiction as based on a Federal question, it is not enough for the Petitioners to show that their claim is dependent upon a treaty or an act of Congress. It correctly stated the settled principles that it must appear from the Complaint that the suit is one which really and substantially involves a controversy as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States; that the suit, in whole or in part, must arise out of such con-

troversy; and that the disputed right must be such that it will be supported if the Constitution, laws or treaty are given one construction or effect, and defeated if they receive another (App. p. 4a, 5a). But the court erred in failing properly to apply these principles to the case before it.

In the present case, the Petitioners have never urged that a Federal question exists merely because their title is dependent upon confirmation by the Treaty and Acts of Congress. If this were the foundation of Petitioners' claim, they would admittedly have no right to invoke Federal jurisdiction. They rest their right to Federal jurisdiction on more solid ground. In their Complaint, Petitioners have alleged facts which show that the case arises out of a present controversy over the effect to be given to the Treaty and Acts of Congress confirming the grant. These facts clearly sustain the conclusion that a decision in the case depends upon the way in which this controversy is resolved.

The Complaint, in paragraph 8 (R. 16), alleges as a fact that the Respondents have asserted, and do assert, in support of their claimed title to the land involved, that the Treaty and Acts of Congress confirming the Atkinson Grant required a survey to be made of the grant before the title was complete, and that, although Congress confirmed the grant as running to the St. Johns River on the north, such confirmation was not conclusive on the United States in this respect, and that the Bureau of Land Management had jurisdiction and authority subsequently to change the location of the northern boundary as previously confirmed by Congress. The Complaint then alleges, in the very next sentence, as the contention of Petitioners, that the Bureau of Land Management had no authority to change the northern boundary of the grant, because the Treaty and Acts of Congress which confirmed the

grant as running to the river on the north were conclusive on the United States in this respect.

The Complaint does not allege that Petitioners and Respondents dispute each other's respective construction of the effect of the Treaty and Acts of Congress. Neither does it allege, in so many words, that their different contentions, as set forth in the first and second sentences of paragraph 8 of the Complaint, constitute the present controversy between the parties, out of which the suit arose. Such conclusions need not be pleaded. The two sentences admit of but one interpretation. Any doubt as to their meaning is cleared up by the third sentence of the paragraph which alleges that a correct decision in the case depends upon a proper construction of the disputed Treaty and Acts of Congress. These averments cannot be made plainer by further explanation. Their clear legal effect and significance, when taken together, is that that the case involves a dispute calling for a construction of the effect of the Treaty and Acts of Congress upon the boundaries, and specifically the clearly defined northern boundary, of the grant.

The Court of Appeals disregarded the plain import of these allegations, and said merely that it did not "see any necessity for a construction of the Treaty or the Acts of Congress in order to make a disposition of the case." (App. p. 5a). In so doing, it substituted its own opinion as to what law and issues the Petitioners rely upon in place of Petitioners' judgment in this respect. The error of the Court is clearly apparent from the following language from the *Kohler* case, supra, where the Court said at 228 U.S., page 25:

> "Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit

arising under' the . . . (Constitution or laws) of the United States by his declaration or bill."

And, the decision is also contrary to the principle of *Bell v. Hood*, supra, where the Court said at 327 U.S. page 681:

> "Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States . . . where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit."

Of particular significance is the following observation of Mr. Justice Holmes, speaking for the Court in the *Hart* case, supra, when he said at 262 U.S. at page 273 that the presence of a Federal question

> ". . . is determined by the allegations of the bill; and usually, if the bill or declaration makes a claim that, if well founded, is within the jurisdiction of the court, it is within that jurisdiction, whether well founded or not."

The allegations of paragraph 8 undeniably make out a claim of the existence of a federal question which, if well founded, is within the jurisdiction of the district court. The court below, however, apparently decided that the alleged Federal claim was not well founded, and held that this circumstance was sufficient to defeat Federal jurisdiction. In this, it committed an error which creates a grave conflict with the principle of the *Hart* case, supra. Furthermore, although the Court paid lip service to the decisions requiring the Court to look to the complaint to determine the existence of a federal question, it obviously

shut its eyes to the complaint before it. Instead of looking to the way the complaint was drawn to see if Petitioners claimed a right to recover under the Treaty and Acts of Congress, it merely looked to its own crystal ball, an approach which conflicts with the decision in *Bell v. Hood,* supra, and the line of similar cases previously discussed.

The rule that the existence of a federal question must be determined from the face of the complaint is subject to but a few exceptions. It is recognized, of course, that if the allegations respecting a federal question clearly appear immaterial, frivolous or made only for the purpose of obtaining jurisdiction, they will be held for nought. *Bell v. Hood,* supra, 327 U.S., at pages 682-3. The Court below, however, did not base its decision on any of these grounds. In fact, it could hardly have done so since the dispute alleged in the complaint regarding the effect of the Treaty and Acts of Congress is, for all practical purposes, the sole basis of the suit. It is clearly an essential, material and serious part of the Petitioners' claim.

The Court below speculated that a decision in this case may involve a construction of the grant, a determination of the consequences of the proceedings held and the action taken by the Commissioners, a decision as to the validity of the patent to the State, a decision as to the effect of the Government surveys, or an adjudication of fact issues (App. p. 5a). It is not clear whether the prospect of these matters formed the basis of the Court's decision that no federal question was involved. If it did, then the decision conflicts with another well settled principle adopted by the decisions of this court, i.e., that when a federal question is involved, federal jurisdiction exists although other questions of fact or of law may be involved which are not federal in character. *Osborn v. Bank of the United States,* 22 U.S. 738, 9 Wheat. 738, 6 L.Ed. 204

(1824). In the latter case, Chief Justice Marshall said at 22 U.S. at pages 819-820:

> ". . . the question is, whether it (i.e., the case) arises under a law of the United States.
>
> "The appellants contend that it does not, because several questions *may* arise in it, which depend on the general principles of the law, not on any act of Congress.
>
> "If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; . . . and if their (i.e., non-federal questions) existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they effect the rights of individuals, would be reduced to almost nothing." (Emphasis added)

The Court of Appeals correctly stated the law that the existence of a Federal question must appear from the statement of the plaintiff's own case, without aid from allegations in the complaint with respect to the defendant's anticipated defense. The Court also properly recognized that under Florida law, the plaintiff in a quiet title suit is required to allege facts showing the claims of defendants. It then raised, without deciding, the question of whether the facts from which the Respondents' claims arise may be used in support of the contention that a Federal question is present. (App. p. 6a) Under the disposition of the case made by the Court of Appeals there was obviously no need for it to determine this point. However, the question thus raised has been answered in the affirmative in several decisions.

Where the contentions of both parties are required to be alleged in order to show the nature of the controversy, such as in a suit to quiet title or to remove a cloud, it is recognized that the alleged claims of the defendant may be relied upon to sustain the existence of a Federal question. *Lancaster v. Kathleen Oil Co.*, 241 U.S. 551, 60 L. Ed. 1161, 36 S.Ct. 711 (1916); *Hopkins v. Walker*, 244 U.S. 486, 61 L.Ed. 1270, 37 S.Ct. 711 (1917); *Roubedeaux v. Quaker Oil & Gas Co.*, 23 F.2d 277 (8th Cir. 1927), cert. denied, 276 U.S. 636, 72 L.Ed. 744, 48 S. Ct. 421. On the other hand, when allegations setting forth the claims of the defendant are improper, such as in ejectment, such averments will not be considered in determining the existence of a Federal question. *Taylor v. Anderson*, 234 U.S. 74, 58 L.Ed. 1218, 34 S.Ct. 724 (1914).

II

AN IMPORTANT QUESTION CALLING FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS RAISED BY THE HOLDING BELOW WHICH REACHED A DECISION THAT A FEDERAL QUESTION DOES NOT EXIST IN THE FACE OF CLEAR ALLEGATIONS TO THE CONTRARY IN THE COMPLAINT.

While the conflict existing between the decision below and prior decisions of the Supreme Court, as described in the preceding section, would, standing alone, amply support the issuance of a writ of certiorari, there is a much more urgent reason for its issuance in this case. In view of the far reaching implications of the decision rendered below, there is a real need for this Court to step in and restore order in the field of Federal jurisdiction as it pertains to Federal questions.

The Court below has held that no Federal question is raised by the Complaint, although it clearly appears from the facts pleaded that a controversy over the effect of a Treaty and certain Acts of Congress does exist, and that the outcome of the case depends upon the Court's construction as to the effect of such Treaty and Acts. This decision, if allowed to stand, will present an insurmountable obstacle to future plaintiffs, particularly in the Fifth Circuit, who have a cause involving a Federal question. If allegations such as those in this case, which so plainly evidence the existence of a Federal question, may be held not to do so, such plaintiffs will be in a quandry as how to proceed. The district courts, following the decision below, will be free to refuse jurisdiction regardless of how bona fide the claim of a federal question may be, and irrespective of how plainly it may be pleaded. The result will inevitably be confusion, uncertainty and delay in an important field of Federal jurisprudence.

One of the most fundamental functions of the Supreme Court is to supervise the Federal judicial system so as to maintain an effective administration of justice. This Court has recognized that it can accomplish such a result only by arriving at definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of the Federal and State courts. It has never hesitated to utilize its powers of supervision to this end. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 95 L.Ed. 702, 71 S.Ct. 534 (1951).

We respectfully submit that the exercise of this Court's power of supervision is called for in the present case in order to correct those errors in the decision below which, if allowed to go uncorrected, will surely undermine the definiteness and finality of long established principles governing the jurisdiction of the district courts in cases involving a Federal question.

Conclusion

For the foregoing reasons the Petitioners pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18337

PEMBROKE HUCKINS, AVA S. HUCKINS and
ELIZABETH A. PAYNE
Appellants,

versus

DUVAL COUNTY, FLORIDA, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Florida

(December 28, 1960)

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge

JONES, Circuit Judge: The appellants brought a suit in the United States District Court for the Southern District of Florida to quiet title to a tract of land. The cause was dismissed for lack of jurisdiction and this appeal is from the order of dismissal. The only question before us is whether a claim is stated giving rise to Federal jurisdiction under 28 U.S.C.A. § 1331,[1] as that section read at the time this action was commenced.

[1] "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Consutution, laws or treaties of the United States."

The complaint alleges that the land involved in the suit is a part of a tract granted in 1816 by the King of Spain to Andrew Atkinson. The Spanish grant is alleged to be of

> "A tract of land consisting of four hundred fifty acres, more or less, on the St. Johns River, at the place known by the name of King's Plantation or the Shipyard, joining on the north with the St. Johns River; on the south with pine land; on the east with a creek, which divides said lands of Vincent Ferrer; and on the west with the swamp of the said St. Johns."

In the deraignment of their title the appellants include the Treaty of Amity, Settlement and Limits, made between Spain and the United States. By Article II of the Treaty Spain ceded to the United States the territory known as East and West Florida. By Article VIII of the Treaty it was provided that,

> "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the domination of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish Nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of

his Catholic Majesty, for the cession of the Floridas, was made, are hereby declared, and agreed to be, null and void." 25 Fla. Stat. Ann. 251, 254.

The appellants also include in their claim of title a reference to two acts of Congress which were enacted to implement certain parts of the Treaty. An Act of May 8, 1822, 2 Stat. 709, provided for Commissioners to be appointed for ascertaining the claims of title to Spanish grant lands in Florida. The Act of February 8, 1827, 4 Stat. 202, confirmed the titles under Spanish grants as determined and reported by the Commissioners. The appellants allege that the grant to Atkinson was approved and confirmed by the Commissioners. The complaint lists a number of instruments which the appellants assert are muniments by which they became vested with Atkinson's title to the land described in the complaint. It is then alleged that a survey was made by the Federal Government in 1851 which shows a line along the edge of a salt marsh on the north edge of the grant. It is also alleged that a further Government survey was made in 1949 by which the northern boundary of the grant was fixed at the approximate location of the salt marsh line of the 1851 survey. The United States granted land north of this boundary line to the State of Florida and it, in turn, conveyed a part thereof to the appellee, Duval County. The appellants contend that the land lying between the northern boundary as shown on the 1949 survey and the St. Johns River was and is a part of the Atkinson grant and is owned by them. They seek to have their title quieted and the adverse claims of the State and the County removed as clouds upon their title. The Trustees of the Internal Improvement Fund is a body corporate and a statutory agency of the State of Florida which holds title to public lands acquired by the State. Ch. 253 Fla. Stat. Ann. The appellants say these facts show that a Federal question

is involved. This is denied by the appellees and the district court has ruled with them.

The test of Federal jurisdiction as based upon a Federal question was stated at an early date by Chief Justice Marshall to be whether "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn v. Bank of the United States*, 22 U.S. 738, 9 Wheat. 738, 6 L.Ed. 204. This test may not be entirely adequate in all cases,[2] but it will suffice here. This test was again set forth in a later decision where it was said,

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Cases cited.) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96. 81 L.Ed. 70.

The same rule, of course applies where a treaty is relied upon. *Hidalgo County Water Control & Imp. Dist. v. Hedrick*, 5th Cir., 1955, 226 F. 2d 1, cert. den. 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851.

Here, it may be said, there is a right claimed by the appellants which was created by a treaty and laws of the United States and such right is an essential element of the

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[2] 3 Volz, West's Federal Practice Manual 36, § 3093.

appellants' cause of action. But it is not such that it will be supported if the treaty or laws receive one construction or effect, and defeated if they receive another.

The appellants, in stating the question involved, make the assertion that the treaty and the congressional acts "should be construed" as fixing the northern boundary of the grant. The appellants, in their complaint, allege that the appellees contend that the congressional acts should be construed as requiring a survey before the title was complete and so authorized the United States to change the boundary of the grant, and hence, the appellants urge; there is Federal jurisdiction. The appellees do not find any such question presented nor do we.

We are unable to see any necessity for a construction of the Treaty or the Acts of Congress in order to make a disposition of the case.

The question here is one of conflicting claims as to the boundaries of the land embraced within the Spanish grant to Atkinson. The answer to the question may involve a construction of the grant, a determination of the consequences of the proceedings held and the action taken by the Commissioners, a decision as to the validity of the patent to the State of Florida, or an ascertaining of the effect of the Government surveys. There may be presented some or all of these questions. There may be issues of fact which require adjudication. It is not enough for the plaintiffs to show that their claim is dependent upon a treaty or on an act of Congress or that the adverse claim has its origin in a patent of the United States. To sustain the jurisdiction it must appear from the complaint "that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States; that the suit, in whole or in part, arose out of such controversy, or that a decision

of the case depended upon such construction." *Kirklin v. Ellerbe,* 5th Cir. 1922, 278 F. 168. The appellants do not make the required showing. The complaint was properly dismissed.

It seems to be well settled that there is no Federal jurisdiction, in the absence of diversity of citizenship, unless a Federal question necessarily appears in the plaintiff's statement of his own claim, and the jurisdiction cannot attach by reason of statements in the complaint with respect to a Federal question resulting from anticipated defenses. See *Devine v. Los Angeles,* 202 U.S. 313, 26 S.Ct. 652, 50 L. Ed. 1046; *Joy v. St. Louis,* 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776; *Kirklin v. Ellerbe, supra.* Under the Florida law the plaintiff in a suit to quiet title must allege the facts showing the claims of the defendants. *Tibbets v. Olson,* 91 Fla. 824, 108 So. 679; *Brecht v. Bur-Ne Company,* 91 Fla. 345, 108 So. 173. Since the claims of the defendants must be set up by a plaintiff, it may be that the facts from which those claims arise can properly be asserted in support of a contention that a Federal question is presented. We need not decide this question since we hold that the facts pleaded do not raise a Federal question.

The judgment of the district court is

AFFIRMED.

APPENDIX B

JUDGMENT

(Extract from the Minutes of December 28, 1960)

No. 18337

PEMBROKE HUCKINS, AVA S. HUCKINS AND ELIZABETH A. PAYNE,

versus

DUVAL COUNTY, FLORIDA, ET AL.,

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Pembroke Huckins, Ava S. Huckins and Elizabeth A. Payne, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

ORDER DENYING REHEARING FILED — January 24, 1961

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18337

PEMBROKE HUCKINS, AVA S. HUCKINS AND ELIZABETH A. PAYNE,
APPELLANTS,

versus

DUVAL COUNTY, FLORIDA, ET AL.,
APPELLEES.

Appeal from the United States District Court for the Southern District of Florida

---

(January 24, 1961)

ON PETITION FOR REHEARING

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

(ORIGINAL FILED — January 24, 1961)

PROOF OF SERVICE

I, HERMAN ULMER, one of the attorneys for PEMBROKE HUCKINS, AVA S. HUCKINS and ELIZABETH A. PAYNE, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, certify that on the 20th day of April, 1961, I served copies of the foregoing Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

1. On the Respondent, DUVAL COUNTY, FLORIDA, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorney of record, J. Henry Blount, Esq., Barnett Bank Building, Jacksonville, Florida.

2. On the Respondents, LEROY COLLINS, Governor, J. EDWIN LARSON, State Treasurer, RAY E. GREEN, Comptroller, RICHARD W. ERVIN, Attorney General, and NATHAN MAYO, Commissioner of Agriculture, as and constituting the Trustees of the Internal Improvement Fund of the State of Florida, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record as follows:

To Honorable Richard W. Ervin,
Attorney General
Tallahassee, Florida

To Fred M. Burns, Esq.
Assistant Attorney General
Tallahassee, Florida

To Ralph M. McLane, Esq.
Assistant Attorney General
Tallahassee, Florida

To H. Rex Owen
Assistant Attorney General
Tallahassee, Florida

Herman Ulmer
Attorney for Petitioners
1215 Barnett Bank Building
Jacksonville, Florida

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NOTE.—The respondents, being satisfied with the petitioners' references to the "Opinion Below," "Jurisdiction," "Statute Involved," and "Statement of the Case," hereby accept them.

QUESTION PRESENTED

Although the petitioners present for review three proposed questions, these respondents cannot accept the question or questions before this Court as being as presented by the petitioners but as being more properly stated as follows:

> Do the allegations of the Complaint present merely a question of land boundaries, or a question arising under the Constitution, laws or treaties of the United States within purview of section 1331(a), title 28, of the United States Code?

It is the contention of the respondents that nothing more than land boundaries is presented by the petitioners' Complaint filed in the District Court.

SUMMARY OF ARGUMENT

The answer to the question of jurisdiction of the District Court of this case revolves around a construction of the following portion of section 1331, title 28, of the United States Code, as that section provided at the time this action was commenced on November 10, 1958, to wit:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and *arises under*

the Constitution, laws or treaties of the United States." (Emphasis supplied)

For the court to have jurisdiction under this statutory provision, the cause of action, that is, the question for determination of the case, must arise under some constitutional, statutory or treaty provision of the United States, not be merely a question of the location of a land boundary.

On April 5, 1816, the King of Spain granted to Andrew Atkinson, by Royal Title, a parcel of land in East Florida, described as being:

> "A tract of land consisting of four hundred fifty acres, more or less, on the St. Johns River, at the place known by the name of King's Plantation or the Shipyard, joining on the north with the St. Johns River; on the south with pine land; on the east with a creek, which divides said lands of Vincent Ferrer; and on the west with the swamp of the said river St. Johns." (Vol. 4, American State Papers, Public Lands, Duff Green Edition, page 406, No. 20.)

This tract of land is sometimes referred to as the "Andrew Atkinson Grant." The Treaty of Amity, Settlement and Limits, between the King of Spain and the United States, by Article VIII thereof, required that "all grants of land made before the 24th of January 1818 . . . shall be ratified and confirmed to the person in possesson of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of" Spain. Subsequent to the effective date of said treaty, the Congress of the United States, by its Act of May 8, 1822, (2 Stat. 709) made provision for, and set up the procedure to be followed, in ratifying and confirming Spanish grants of land in the Floridas prior to January 24, 1818, includ-

ing the setting up of a Commission to receive applications for ratification and confirmation of such claims, to determine what disposition should be made of such applications, and to report their findings and recommendations to the Congress of the United States. This the said Commission did as to the said Andrew Atkinson grant, finding it valid and binding on the United States under and pursuant to said article VIII of the said Treaty of Amity, Settlement and Limits, and recommending to the Congress that the said grant be recognized and confirmed. The said Andrew Atkinson grant was approved and confirmed by the said Commission and by the Congress of the United States by its Act of February 8, 1827 (4 Stat. 202).

Under section 7 of said Act of February 8, 1827, it was made the duty of the keepers of the public archives of the Floridas to furnish "the surveyor of public lands in Florida, without delay, a description of each claim to land, which shall have been confirmed, which shall specially designate the quantity, locality and connection of such claim; and where the confirmation may have been made on a grant or survey, a copy of the courses and distances contained in such grant or survey, and the date of the survey or grant; and it shall be the duty of the surveyor of public lands in Florida, *to cause*, under such instructions as he may receive from the Treasury Department, *the said claims to be surveyed*, and connected with the township lines of the public surveys, and to give to them their proper township and sectional numbers, agreeably to such descriptions; and he shall make separate plats and certificates of survey of the same, one of which shall be returned to the office of the register of the land office for the district in which the land may lie, and the other shall be delivered to the claimant. But it shall be

the duty of the surveyor to withhold his certificate, if he shall have reason to believe that the lands claimed are other lands than those intended to be confirmed; or if it shall appear that the survey, under which the land is claimed, has been made subsequent to the date of the survey under which the claim was confirmed." (Emphasis supplied.)

These proceedings and Congressional action deal with a parcel of land and the identification and location of it. The existence and the operation of the Treaty of Amity, Settlement and Limits, the Act of Congress of May 8, 1822 (2 Stat. 709) and the Act of Congress of February 8, 1827 (4 Stat. 202), are admitted and their construction is not necessary to a determination of the question of the rights of the parties. The question is one of ascertaining and determining the extent of the lands granted to Andrew Atkinson by the King of Spain on April 1, 1816. The petitioners contend that its boundaries extend to and embrace the area claimed by them, and the respondents contend that it extends to a lesser area. The contention of both parties relate to land boundaries, not to a construction or application of the said treaty or the said Acts of Congress, or either of them. The purpose and intention of the said Acts of Congress, including the survey to be made thereunder, was the establishment of the title and boundaries of the land. The two lower courts were correct in holding that only a question of land boundaries, and no question of the construction of the federal constitution, or any act or treaty, was involved, and that the District Court was without jurisdiction of the cause.

ARGUMENT

THE COMPLAINT OF THE PETITIONERS FILED IN THE DISTRICT COURT INVOLVES MERELY AND ONLY A QUESTION OF LAND BOUNDARIES AND NOT ONE OF THE CONSTRUCTION OF THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES.

The Treaty of Amity, Settlement and Limits between the King of Spain and the United States by article VIII thereof, required that the United States recognize as valid grants made by Spain prior to January 24, 1818, which, under the laws of Spain, would have been recognized had there been no change of national title. This constitutional provision was deemed applicable to the Andrew Atkinson grant of April 5, 1816, described in the Complaint filed in the District Court. This grant, pursuant to the act of May 8, 1822, was duly considered, approved and fully recognized as valid, by the Commission provided by the said Act, which action of the said Commission was recognized and approved by the Act of Congress of February 8, 1827, subsequent to which it was duly surveyed as required by said Act of 1827.

A reading of the Complaint clearly shows a dispute as to the location of the boundaries of the Andrew Atkinson grant. Its location and boundaries were established and fixed by the proceedings had under the said acts of May 8, 1822 and February 8, 1827, which boundaries must be presumed to have beeen surveyed by the government surveyor as directed by the Act of February 8, 1827. If the said government surveyor made an error in running the boundaries of the said tract of land, it was the fault and error of the surveyor and not of the Treaty of Amity, Settlement and Limits.

or the acts of May 8, 1822 or of February 8, 1827. The case does not arise under the Constitution, laws or treaties of the United States.

In *Gully v. First National Bank*, 299 U.S. 109, text 112 and 113, 57 S. Ct. 96, 81 L. ed. 70, text 72, Mr. Justice Cardozo, writing for the Court, said that:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books, some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. Starin v. New York, 115 U.S. 248, 257, 29 L. Ed. 388, 390, 6 S. Ct. 28; First Nat. Bank v. Williams, 252 U.S. 504, 512, 64 L. Ed. 690, 692, 40 S. Ct. 372. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Ibid.; King County v. Seattle School Dist. 263, U.S. 361, 363, 364, 68 L. Ed. 339-341, 44 S. Ct. 127. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (New Orleans v. Benjamin, 153 U.S. 411, 424, 38 L. Ed. 764, 769, 14 S. Ct. 905; Defiance Water Co. v. Defiance, 191 U.S. 184, 191, 48 L. Ed. 140, 143, 24 S. Ct. 63; Joy v. St. Louis, 201 U.S. 332, 50 L. Ed. 776, 26 S. Ct. 478; Denver v. New York Trust Co. 229 U.S. 123, 133, 57 L. Ed. 1101, 1120, 33 S. Ct. 697 . . . .)"

In *Taylor v. Smith*, CCA 7th, 167 Fed. 2d 797, 12 A.L.R. 2d 1, text 4, the court said:

> "To bring the case within the statute the right created by the laws of the United States must be an essential element of plaintiffs' cause of action. The right must be such that it will be supported if the laws of the United States are given one con-

struction or effect, and defeated if they receive another. but a genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto." Citing Gully v. First National Bank, supra.

And,

" . . . before the jurisdiction of the District Court can be maintained on the ground that a federal question is involved, it must appear that the federal question is one in substance and not in mere assertion and 'this must appear from the plaintiff's statement of his own claim . . . .'"

The case of *Shulthis v. McDougal* (1912), 32 S. Ct. 705, 225 U.S. 561, 56 L. ed. 1205, text 1211, involved conflicting claims to a tract of land alloted to the Creek Indians and the Court speaking through Mr. Justice Van Devanter, had this to say:

"3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all title in those states are traceable back to those laws. Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 24 L. Ed. 656; Colorado Cent. Consol. Min. Co. v. Turck, 150 U.S. 138, 37 L. Ed. 1030, 14 Sup. Ct. Rep. 35; Blackburn v. Portland Gold Min. Co. 175 U.S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358; Florida C. & P. R. Co. v. Bell, 176 U.S. 321, 44 L. Ed. 486, 20 Sup. Ct. Rep. 399; Shoshone Min. Co. v. Rutter.

177 U.S. 505, 44 L. Ed. 864, 20 Sup. Ct. Rep. 726; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U.S. 523, 44 L. Ed. 872, 20 Sup. Ct. Rep. 715."

In *Hooker v. Los Angeles*, 168 U.S. 314, 23 S. Ct. 395, 47 L. Ed. 487, it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States and so reviewable here. But this Court held otherwise, and said:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law; on which the decision of the state court was final. San Francisco v. Scott, 111 U.S. 768, 28 L. Ed. 593, 4 Sup. Ct. Rep. 688; California Powder Works v. Davis, 151 U.S. 389, 38 L. Ed. 206, 14 Sup. Ct. Rep. 350."

Mr. Justice Brewer in *Shoshone Mining Co. v. Rutter and Bradley* (1900), 177 U.S. 505, 20 S. Ct. 726, 44 L. Ed. 864 in speaking of the constitutional provisions relating to the jurisdiction of Federal Courts and the Congressional authority concerning Federal jurisdiction, said:

" . . . It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several states . . . "

and then quoted from Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203, 24 L. Ed. 656, 658:

" ' "The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must, in some form, appear upon the record, by a statement of facts, 'in legal and logical form', such as is required in good pleading, . . . that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States." ' "

The case of *Robinson v. Anderson* (1887), 121 U.S. 522, 30 L. Ed. 1021 is peculiarly applicable to the case at bar as the Court, through Mr. Chief Justice Waite, said:

" 'This is a writ of error sued out under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order of the circuit court dismissing a suit brought by Robinson, a citizen of California, against other citizens of the same State, for want of jurisdiction. The claim on the part of the plaintiff in error is that upon the face of the complaint it appears that the suit is one arising under the Constitution or laws or treaties of the United States, and that consequently the circuit court had jurisdiction by reason of the subject matter of the action; but on examination we find that, according to the plaintiff's own showing in his complaint, his rights all depend on the boundaries of the Rancho Los Bolsas, granted by the Mexican Government to Manuel Nieto, and confirmed and patented to his representatives by the United States under the Act of March 3, 1851, Chap. 41, 9 Stat. at L. 631, "to ascertain and settle the private land claims in the State of California." Primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of

confirmation, and it nowhere appears that either the Constitution or any law or treaty of the United States is involved in this.'

* * *

" 'Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be; and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on. The circuit court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially, if, as here, they were evidently made, "for the purpose of creating a case" cognizable by the circuit court, when none in fact existed . . . . ' "

From the above and foregoing authorities the rule appears that an action having for its purpose the enforcement of a right which finds its origin in the Constitution, treaties or laws of the United States is not necessarily and for that reason alone one arising under such Constitution, treaties and laws. An action arises under the Constitution, treaties or laws of the United States, or presents a federal question, where and only where it involves a question with respect to the construction or effect of the Federal Constitution, or with respect to the validity, construction, or effect of an act of Congress or a treaty, the determination of which is

necessary to a correct decision, or involves some right, title, privilege or immunity which will be sustained if the Constitution, treaties or laws of the United States are given one construction, and defeated if they receive another construction. Would the right of the petitioners to the land area claimed in their Complaint be sustained if article VIII, of the Treaty of Amity, Settlement and Limits, between the King of Spain and the United States, and the Acts of Congress of May 8, 1822 and of February 8, 1827, are given one construction and would such right of the petitioners be defeated if they are given another? These respondents submit that the petitioners' claim depend upon the boundaries of the said Andrew Atkinson grant, and not on the construction of the said treaty and acts of Congress or any of them.

The respondents contend that there are no positive allegations or facts in the Complaint which affirmatively show that a construction of the Treaty or the Acts of Congress are necessarily involved or required. The Treaty, and the Acts of Congress made pursuant thereof, are the sources of Andrew Atkinson's title, the original claimant. There are no factual allegations in the Complaint to the effect that the mandates of the Treaty have not been complied with. Neither are there any factual allegations in the complaint to show that the Acts of Congress of May 8, 1822 or of February 8, 1827 have not been complied with. The petitioners assert, however, that their rights require a construction of said Treaty and said Acts of Congress; that their rights will be supported if the treaties and laws are given one contruction or effect, and defeated if they receive another. These allegations are merely conclusions of the pleader. The Treaty required that the United States would recognize grants of land made be-

fore the 24th day of January, 1818 by his Catholic Majesty to claimants in possession, and, that the same would be ratified and confirmed to such claimants. Nothing can be gleaned from the pleading that this was not done. Since the Act of Congress of February 8, 1827 required that a survey of the private claims be made, and also required the issuance of patents to such claimants, after survey, it would seem reasonable that a patent must have been issued, although the plaintiffs made no mention of the issuance of a patent in the deraignment of their title (R. 4). Under the Treaty and said Act of Congress, we believe that after the lapse of more than 130 years the Court will indulge the presumption that the legal processes of acquiring title were complied with and that all things were done to secure to the claimant Andrew Atkinson title to lands which he claimed under the grant papers and which lands he was in possession.

The description of "Parcel A", referred to in the Complaint, is not tied to any survey or map other than the Extension Survey of 1949. The fact that an Extension Survey was made in 1949, as alleged in the Complaint, is sufficient to show that "Parcel A", which plaintiffs now claim, was not shown on the Township map or survey of 1851. The reason that "Parcel A" was not shown on the map or survey of 1851 can only be surmised. It was the duty of the public surveyor, in making surveys and maps of the Township, from his field notes, to show the position of the lands that were surveyed. "Parcel A", not having been shown on the 1851 map or survey, being shown for the first time on the Extension Survey of 1949, could not, therefore, have been determined by the public surveyor to have been part of the original grant.

The petitioners in their alleged claim of ownership of "Parcel A", deraign their title of the original grant from its confirmation down to the time when they received title. In this deraignment (R. 8) it is shown that the title to "said land" was quieted in a suit in the Circuit Court; that a Final Decree was entered in said cause on May 3, 1916. If it is the purpose of the petitioners to fix and determine the Northerly boundary of the grant as running to the river then, the question arises: what has happened to the Northerly boundary since the Final Decree in said Circuit Court, which Decree necessarily had to describe the boundaries of the lands, the title of which was quieted? The said confirmatory Act of Congress did not fix or definitize the northern boundary of the original grant. According to the terms of the Statute, a survey was required also the issuance of a patent was authorized upon a survey being made of the claim. Such survey necessarily had to be made of the lands of which the claimant was in possession in order to meet the requirements and provisions of Article VIII of the Treaty.

The paramount reason for requiring surveys to be made was in order to separate the private claims from the public domain. Pursuant to the requirements of said statute, surveys were accordingly made and returned to the General Land Office and became a part of the public records. These surveys of the private claims made pursuant to the statute necessarily had to be made of the lands which claimants were in possession of, in order to conform to the provisions of Article VIII of the Treaty. It is alleged in the Complaint that a survey of said Township, by Marcellus A. Williams, was made in the first quarter of 1851 and approved by the Surveyor General on October 25, 1851. The private claim of Andrew Atkinson, and other

claimants, are shown on this survey or map of said Township.

The Extension Survey of 1949, made by Oscar B. Walsh and Paul K. Russell, clearly shows the northern boundary of the Atkinson grant to be some distance from the lands having a position in said Extension Survey. "Parcel A" described in the Complaint was determined to be a part of the public domain of the United States. (R. 13) Therefore, it would appear that the case made by the Complaint is no more than a dispute with reference to a boundary. This was the conclusion reached by the District Judge, which was affirmed by the Court of Appeals. Petitioners argue, in their Brief, that for practical purposes, the sole basis of this suit under the Treaty and Acts of Congress is to have the river established as a boundary of the grant, and, that such right constitutes a federal question. They argue that with respect to their rights, there exists a dispute with respect to the construction, or effect, of the Constitution laws and treaties creating such rights. The respondents, on the other hand, contend that the Complaint does not by positive allegations of facts show the existence of a substantial right as would constitute a federal question.

The petitioners have failed, by their Complaint filed in the District Court, to show that the litigation "arises under the Constitution, laws or treaties of the United States." Only a question of the boundaries of the Andrew Atkinson grant is in issue.

NOTE: There appears in 12 A.L.R. 2d, on pages 5 to 74, an annotation on the question of "What actions arise under Constitution, laws and treaties of the United States; general principles."

Respectfully submitted,

RICHARD W. ERVIN
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FRED M. BURNS
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Improvement Fund of Florida

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1325 Barnett National Bank Bldg.
Jacksonville, Florida
Attorney for Respondent
Duval County, Florida

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Herman Ulmer, Jr., Esquire, 1215 Barnett Bank Building, Jacksonville 2, Florida, Attorney for Petitioners, by mail, this ..... day of May, A.D. 1961.

FRED M. BURNS

Supreme Court of the United States

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1960

No. 916

PEMBROKE HUCKINS AND AVA S. HUCKINS, HIS WIFE, AND ELIZABETH A. PAYNE, A WIDOW,

Petitioners,

v.

DUVAL COUNTY, a political subdivision of the State of Florida; and LEROY COLLINS, Governor, J. EDWIN LARSON, State Treasurer, RAY E. GREEN, Comptroller, RICHARD W. ERVIN, Attorney General, and NATHAN MAYO, Commissioner of Agriculture, as and constituting the Trustees of the Internal Improvement Fund of the State of Florida,

Respondents.

PETITIONERS' REPLY BRIEF

Petitioners present herewith their Brief in reply to the arguments and questions raised in the Brief of Respondents in Opposition to the Petition for Certiorari.

1. The type of action is immaterial in determining the existence of a federal question.

The entire thrust of the Respondents' Brief is that this case presents nothing more than a dispute over the location of a land boundary (Respondents' Brief, pages

1, 2, 4; 5, 11, 14). Respondents apparently take the position that a case involving a boundary dispute cannot present a federal question. Such, however, is not the law.

Title 28, U. S. C., Section 1331, provides that the federal district courts have jurisdiction "of *all* civil actions" involving a federal question and the jurisdictional amount. Congress has not excluded any particular type of civil case from this grant of jurisdiction. There is nothing unique about a quiet title action involving the question of a boundary that places it beyond the pale of the statutory language when, as in the case at bar, a federal question is alleged.

In *Bell v. Hood*, 327 U. S. 678, 66 S.Ct. 773, 90 L.Ed. 939, the Supreme Court clearly recognized that the *type* of suit involved was not determinative of the presence or absence of a federal question. In that case, the plaintiffs brought suit against certain F.B.I. agents to recover damages for an alleged illegal search of their premises and seizure of their possessions in violation of their constitutional rights. Jurisdiction of the federal court was invoked on the basis that the case arose under the Fourth and Fifth Amendments to the Constitution. The district court, on its own motion, dismissed the action for lack of jurisdiction on the ground that it did not arise under the Constitution or laws of the United States. The Court of Appeals affirmed on the same ground. The Supreme Court granted certiorari "because of the importance of the jurisdictional issue involved" (90 L.Ed., at 942). The defendants contended, in support of the district court's dismissal, that the case presented nothing more than a common law action for trespass which was not a federal question. The Supreme Court rejected this argument. In reversing the lower courts, it said, at 90 L.Ed. 942, 943:

> "First, they (i. e., the respondents) urge that the complaint states a cause of action for the com-

mon law tort of trespass made actionable by state law and that it therefore does not raise questions arising 'under the Constitution or laws of the United States.' . . .

"Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. . . . where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit."

Surely, if a common law trespass suit may present a federal question when predicated upon a construction of the Constitution, logic dictates that a suit to quiet title involving a question of a boundary, the location of which will depend upon the *effect* given to a Treaty and certain Acts of Congress, likewise presents a federal question.

2. Blaming the relocation of the north boundary on the government surveyor does not dispose of the jurisdictional issue.

In the description of the Atkinson Grant, as confirmed, the northern boundary is stated to be the St. Johns River (R-3). On page 5 of their Brief, Respondents concede that the location and boundaries of the grant were established and fixed by the confirmation procedure and Acts of Congress. However, they argue (pages 5 and 6 of Respondents' Brief) that if the government surveyor made an error in running the boundaries, it was the fault of the surveyor and not of the Treaty or Acts of Congress. Placing the blame on the surveyor does not dispose of the jurisdictional matter before the Court. It merely

points up the sole controversy in the case which, as set forth in the Complaint (R. 16-18), is whether the effect of the confirmation of the grant by the Treaty and Acts of Congress was to fix the northern boundary at the place where it was described in the grant itself (i. e., at the St. Johns River), so that the United States was bound thereby, and so that the United States Bureau of Land Management, through its surveyor, had no jurisdiction and authority, through error, fault, or otherwise, to locate the northern boundary elsewhere as far as the United States, and those holding under it, are concerned. This places the *effect* of the Treaty and Acts of Congress squarely in issue.

3. The case of Robinson v. Anderson is not applicable.

On pages 9 and 10 of their Brief, Respondents have cited *Robinson v. Anderson*, 121 U. S. 522, 30 L.Ed. 1021, as being "peculiarly applicable" to the case at bar. The facts set forth in the opinion, however, disclose that there is a basic distinction between the two cases. The *Robinson* case involved a dispute as to the boundaries of a Mexican grant which had been confirmed by the United States. The plaintiff, in his complaint, did not show that a dispute existed as to the construction or effect of the Constitution or any law or treaty of the United States. All the court was called upon to to construe was the language of the description in the grant itself. This is admittedly not a federal question, and the Supreme Court properly affirmed the lower Court's dismissal for want of federal jurisdiction, saying at 30 L.Ed. 1021:

> "Primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of confirmation, and

> *. . . it nowhere appears that either the Constitution, or any law or treaty of the United States is involved in this.*" (Emphasis added)

Obviously, the decision in the *Robinson* case is not applicable in the present case. In *Robinson*, the alleged dispute was over the construction of the language of the description in the grant, not over the effect of the Treaty or laws of Congress. In the present case, the Complaint does not show any dispute whatever as to the construction to be placed on the description of the Atkinson Grant as contained in the grant. The sole dispute alleged in the Complaint is over the *effect* of the confirmation by the Treaty and Acts of Congress upon the jurisdiction of the Bureau of Land Management, through its surveyor, to relocate the north boundary of the grant as confirmed. This clearly constitutes a federal question.

4. Petitioners' right to the land will be sustained if the Treaty and Acts of Congress are given one effect, but defeated if given another.

On page 11 of their Brief, Respondents pose the following question:

> "Would the right of the petitioners to the land area claimed in their Complaint be sustained if article VIII, of the Treaty of Amity, Settlement and Limits, between the King of Spain and the United States, and the Acts of Congress of May 8, 1822 and of February 8, 1827, are given one construction and would such right of the petitioners be defeated if they are given another?"

The answer, as determined by the Complaint, is plainly, "Yes." If the Court holds, with Petitioners, that the effect of the confirmation by the Treaty and Acts of Congress

was to preclude the Bureau of Land Management from having authority or jurisdiction to change the northern boundary as it was described in the grant, i. e., at the river, then Petitioners' right to the land involved will be sustained. On the other hand, if the effect of the Treaty and Acts of Congress is held, as Respondents claim, to allow the Bureau of Land Management to change the north boundary from where it was described to be in the grant, then Petitioners' claim to the land will be defeated. It has long been recognized that a controversy as to the construction or *effect* of the Constitution or some law or treaty presents a federal question. *Gully v. First National Bank*, 299 U. S. 109, 57 S.Ct. 96, 81 L.Ed. 70, at 72 and 73 (1936); *Shulthis v. McDougal*, 225 U. S. 561, 32 S.Ct. 704, 56 L.Ed. 1205, at 1211 (1912); *Devine v. Los Angeles*, 202 U. S. 313, 26 S.Ct. 652, 50 L.Ed. 1046, at 1053 (1906); *Shoshone Mining Company v. Rutter*, 177 U. S. 505, 20 S.Ct. 726, 44 L.Ed. 864, at 865 (1900); *Little York Gold Washing and Water Company v. Keyes*, 96 U. S. 199, 24 L.Ed. 656, at 658 (1875).

Conclusion

For the above reasons, and for those set forth in the Petition for Certiorari, Petitioners pray that their Petition be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, HERMAN ULMER, one of the attorneys for PEMBROKE HUCKINS, AVA S. HUCKINS and ELIZABETH A. PAYNE, Petitioners herein, and a member of the Bar of the Supreme Court of the United States certify that on the 2nd day of June, 1961, I served copies of the foregoing Petitioners' Reply Brief on the several parties thereto, as follows:

1. On the Respondent, DUVAL COUNTY, FLORIDA, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorney of record, J. Henry Blount, Esq., Barnett Bank Building, Jacksonville, Florida.

2. On the Respondents, LEROY COLLINS, Governor, J. EDWIN LARSON, State Treasurer, RAY E. GREEN, Comptroller, RICHARD W. ERVIN, Attorney General, and NATHAN MAYO, Commissioner of Agriculture, as and constituting the Trustees of the Internal Improvement Fund of the State of Florida, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record as follows:

To Honorable Richard W. Ervin
Attorney General
Tallahassee, Florida

To Fred M. Burns, Esq.
Assistant Attorney General
Tallahassee, Florida

To Robert C. Parker, Esq.
Assistant Attorney General
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To Sid J. White, Esq.
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